

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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C. F. PETERSON,

*Plaintiff in Error,*

*vs.*

THE UNITED STATES OF  
AMERICA,

*Defendant in Error.*

No. 4147

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
TERRTIORY OF ALASKA, THIRD  
DIVISION.

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BRIEF OF PLAINTIFF IN ERROR.

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*Plaintiff in Error.*

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## STATEMENT OF THE CASE.

Plaintiff in error, C. F. Peterson, was charged before W. H. Rager, United States Commissioner and ex-officio justice of the peace for Knik Precinct, Territory of Alaska, with having, on the 21st day of September, 1922, in said precinct, intoxicating liquor, to-wit, whiskey, known as "white mule," in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the "Alaska Dry Law."

Thereafter a hearing was had before said Commissioner and plaintiff in error was found guilty. An appeal was taken to the United States District Court for the Territory of Alaska, Third Division, and upon a trial thereof plaintiff in error was found guilty and judgment entered against him and he was sentenced to one year in the federal jail at Anchorage, Alaska, and in addition thereto to pay a fine of \$1,000.00, and in default of the payment of such fine to serve a term in said jail not to exceed one day for each \$2.00 of said fine unpaid.

## ASSIGNMENT OF ERRORS.

First. The Court erred in overruling the objection of the defendant to the introduction of any testimony in the cause, and proceeding to the trial

of the same upon the complaint in said cause, as follows:

“Mr. RAY.—Defendant objects to the introduction of any testimony of the witness, after being sworn and now on the stand, on the ground that this Court is without jurisdiction to try the case on the complaint on file here: First, on the ground that it is violation of the rights of the defendant as guaranteed to him under the fifth amendment to the Constitution of the United States providing that no prosecution for a felony may be had except on the presentment of a grand jury; and, second, the complaint on which this charge is based is signed ‘C. W. Mossman,’ not ‘C. W. Mossman, deputy marshal,’ and is, therefore, invalid.

In view of the provisions of Sec. 1891, R. S., that ‘The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States,’ it is our contention that the Alaska Bone Dry Law being a statute of the United States, and the term of imprisonment on a conviction under it may be more than one year, that a case can only be tried after presentment and indictment by a grand jury. I also desire to renew again the plea in abatement which I filed this morning: That the records and files of this court show that for this same offense, with reference to the same intoxicating liquor, this man is now being held to answer before the grand jury, and that the doctrine of merger should apply. I would

just like to read from volume 16, C. J., section 10: 'The merger of one offense in another occurs when the same criminal act constitutes both a felony and a misdemeanor. In such a case at common law, the misdemeanor is merged in the felony, and the latter only is punishable. This doctrine applies [53] only where the same criminal act constitutes both offenses, and where there is identity of time, place, and circumstances. Moreover, the offenses must be of different grades, and the rule does not apply where both offenses are felonies or misdemeanors.'

The COURT.—At this time I will deny the motion. While I think there is something in one point which Mr. Ray has raised I do not think it should be decided hastily and if I should be wrong in denying the motion at this time the same point can be raised on motion in arrest of judgment. As to the objection to the complaint, I think the description in the body of the complaint of C. W. Mossman, as a deputy United States Marshal is sufficient. Defendant allowed an exception.

Second. The Court erred in permitting the witness Hoffman to testify, over the objection and exception of the defendant, as to the occurrences which were the basis of the prosecution, upon the ground that the witness Hoffman has no search-warrant, which testimony was as follows:

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—We did not.

Mr. RAY.—The defendant objects to the introduction of any further testimony of the witness as to the defendant or the boat, on the ground that such evidence attempted to be offered is in plain violation of the constitutional rights of the defendant guaranteed him under the fourth and fifth amendments to the Constitution of the United States.

The COURT.—Objection overruled. Exception allowed.

Third. The Court erred in permitting the conversation of the defendant Peterson with the officer Hoffman to be introduced, over and against the objection and exception of the defendant, as follows:

Q. What was said by Mr. Peterson and you at that time?

Mr. RAY.—We object to any conversation had by the defendant and officers at that time.

The COURT.—You may find out whether he was under arrest at the time or whether he made a voluntary statement.

Mr. RAY.—Was Peterson under arrest at the time of your conversation with him?

The WITNESS.—Yes, I think so.

Q. Did you tell him that you would testify as to anything he might say?

A. I did not. [54]

Q. Did you advise him that whatever he said would be used against him on the trial of the case?

A. It was a general conversation.

Q. At no time did you yourself tell him that anything you might say might be used against you at the trial of the case.

A. No, sir, nothing like that was said.

Mr. RAY.—We object to the conversation.

The COURT.—Did you offer him any inducement of any kind or try to persuade him to talk?

A. His conversation was voluntary.

The COURT.—The objection is overruled. Exception allowed.

Fourth. The Court erred in denying the motion of the defendant to strike out the testimony of the witness Hoffman, to which ruling an exception to the defendant was allowed by the Court, as follows:

Mr. RAY.—We ask that the witness Hoffman's testimony be stricken on the ground that the same was obtained, first, in violation of the constitutional rights of the defendant as guaranteed in the fourth and fifth amendments and, further, that some statement was obtained from the defendant by the officers without his first being warned or advised as to his rights.

The COURT.—The motion is denied. Exception allowed.

Fifth. The Court erred in permitting the introduction of testimony of the witness Mossman relative to occurrences upon which the prosecution was based, over and against the objection and exception of the defendant, as follows:

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—No, sir.

Q. You watched the activities of this person for two or three hours?

A. We were not in sight of him all that time.

Q. Well, as you have described in your testimony? A. Yes, sir.

Mr. RAY.—We object to any further testimony from the witness on the stand.

The COURT.—Objection overruled. Exception allowed. [55]

Sixth. The Court erred in denying the motion of the defendant to strike out the testimony of the witness Mossman, to which ruling an exception to the defendant was allowed by the Court, as follows:

Mr. RAY.—We move that the testimony of the witness Mossman be stricken and that the jury be instructed to disregard any testimony with reference to the defendant Peterson and any boat or the contents taken without a search-warrant first served in violation of the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Seventh. The Court erred in permitting the introduction of testimony of the witness Watson as to a conversation with the defendant at the time of his arrest, over and against the objection and exception of the defendant, as shown by the bill of exceptions.

Q. At that time, and before you went down to the boat—before Mr. Hoffman and Mr. Mossman returned—did Mr. Peterson, the defendant, make any voluntary statement to you in regard to the boat of any kind?

Mr. RAY.—Just a minute, had you a warrant? A. No, sir.

Q. Had you placed him under arrest?

A. No, sir.

Q. Was he under arrest while you were talking to him?

A. I don't know that I hold him he was.

Q. You in no manner advised him or warned him that any conversation would be used against him. A. I did not.

Mr. RAY.—We object to any conversation.

The COURT.—Objection overruled. Exception allowed.

Eighth. The Court erred in denyin the motion of the defendant for a directed verdict of not guilty, to the denial of which motion an exception was allowed by the Court, as shown by the bill of exceptions: [56]

Mr. RAY.—The defendant moves to direct a verdict on the grounds:

1. That there is no testimony in this case to prove ownership or possession by the defendant Peterson of the liquor introduced in evidence.

2. That there is no testimony of ownership of the boat in Peterson.

3. That there is no testimony in the case tending to connect the defendant with the commission of this offense, and for the further reason that the testimony sought to be introduced has its basis in an illegal search and seizure in contravention to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Ninth. The Court erred in denying the motion of defendant in arrest of judgment, on the ground that the Court was without jurisdiction to render judgment against the defendant.

Tenth. The Court erred in entering judgment in said cause against defendant.

### ARGUMENT.

The record in this case shows that prior to the filing of this charge before the United States Commissioner under the Alaska Dry Law, plaintiff in error was charged under the National Prohibition Act and bound over by said Commissioner to appear before the next grand jury of the Third Division of the Territory of Alaska upon the same charge (Tr. p. 23). The evidence shows that on the day in question Government officers were standing on the dock at Anchorage, when they saw a boat come up to the dock and land there; that a man whose identity they did not know got out of said boat and went into the dock office and after a while he came out, got into his boat and went down the bay three or four miles and landed there. They further testified that they saw the party in the boat make two

or three trips from the boat to the shore; that they knew he could not get away, so they went down there and found plaintiff in error asleep on the bach, and a boat (Tr. p. 27); that they did not know what was in the boat (Tr. pp. 35-36), and that they had no search warrant. They searched the boat and found ten 10-gallon kegs of "white mule"; that the plaintiff in error was arrested; that he was not given warning as to his constitutional rights, and that he said he had been out with the boat all night (Tr. pp. 35-40).

I. From this evidence it is apparent that the officers had no grounds upon which to base this search and seizure. They very frankly admit they did not know who was in the boat and did not know that anything was in the boat—in fact, they didn't see anything in it. They also admit that after landing down the bay it would be impossible for a man to get out of there, yet, in the face of this situation, where it is perfectly apparent that a search warrant could easily be obtained, they took the law into their own hands and went down to the boat and arrested plaintiff in error illegally and then searched the boat without any authority of law and against the constitutional rights of plain-

tiff in error, as set out in assignment of errors 2, 4, 5 and 6.

There is nothing in this record to show that the officers had even a suspicion that any law of the United States was being violated. As far as the record is concerned, any citizen could have his rights violated with the same impunity. The mere fact that the result of this search was the finding of intoxicating liquor is not enough, under numerous decisions of this court and other courts, to justify the search.

It is plaintiff-in-error's contention that under the record the evidence was illegally seized and acquired; that plaintiff in error was compelled to supply evidence against himself and that the same was improperly admitted.

The fourth amendment to the Constitution of the United States provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fifth Amendment further provides:

“No person \* \* \* \* shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The following cases announce the principles that we are contending for:

*United States vs. Slusser*, 270 Fed. 819.

*Hoyer vs. State*, 193 N. W. 89.

*Boyd vs. United States*, 116 U. S. 616.

*Weeks vs. United States*, 232 U. S. 383.

*Amos vs. United States*, 255 U. S. 313.

*Gouled vs. United States*, 255 U. S. 298.

*Snyder vs. United States*, 285 Fed. 1.

*Giles vs. United States*, 284 Fed. 208.

*United States vs. Ovaritius*, 267 Fed. 227.

*United States vs. Kaplan*, 286 Fed. 973.

II. The Court erred in permitting the admission of testimony of the witness Mossman as to the conversation had with the plaintiff in error at the time of his arrest. The record affirmatively shows (Tr. p. 31-40) that the officers did not warn the plaintiff in error as to his constitutional rights as to making any statement. (Assignment of Errors III and VII.

It is true that the witness states that it was a voluntary statement, but that is merely a conclusion of the witness. It might not have been made if the officer had warned him of his constitutional right. In any event, it was the duty of the officer to warn him as to his constitutional rights. It being admitted that he failed to do so, the Court erred in admitting the statement.

*United States vs. Kallas*, 272 Fed. 742.

*United States vs. Bell*, 81 Fed. 830.

III. The first assignment of error is that the trial court was without jurisdiction to try the case on the complaint filed.

The Fifth Amendment to the Constitution provides that no person shall be held to answer for an infamous crime, except on presentment to a grand jury.

Section 10509, Comp. Stat., provides:

“All offenses which may be punishable by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

The record in this case shows that plaintiff was sentenced to one year in jail and in addition thereto to pay a fine of \$1,000.00, in default of the payment

of which he should serve a term in jail not to exceed one day for each \$2.00 of said fine unpaid (Tr. p.53).

It is clear from this judgment that he may be imprisoned for more than one year under this sentence, and that he was denied the constitutional right of having this case presented to a grand jury before trial.

While we are aware that this court, in *Abbate vs. United States*, 270 Fed. 735, *Koppitz vs. United States*, 290 Fed. 96, and *Simpson vs. United States*, 290 Fed. 963, has held that the Alaska Bone Dry Law is valid, it appears from an examination of these cases that they were decided prior to the amendment to the National Prohibition Act of November 23, 1921 (c. 134, s. 5, 42 Stat. 223), or that this amendment was not called to the Court's attention, which provides:

“All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act.  
\* \* \*”

It will be noted that Congress in this amendment based the continuance of the then existing laws upon the one proposition that their provisions would still be in force except where such provisions were directly in conflict with any provision of the National Prohibition Act. That the Alaska Bone Dry Law is in direct conflict with the National Prohibition Act is clear. In the present case, under the National Prohibition law, plaintiff in error could only be fined \$500.00, yet the record in this case shows that he was sentenced to one year in jail and a fine of \$1,000.00—a direct conflict.

There is another conflict, the National Prohibition Act, which makes the possession of intoxicating liquor fit for beverage purposes a crime. What is White Mule? Is it an intoxicating liquor fit for beverage purposes?

If this court gives to the word “all,” as used in this amendment, its common, ordinary meaning, it must construe the same to mean every law, whether general or special. It means all laws passed by Congress, and both the Bone Dry Law and the Prohibition Act are such. A reading of Section 2 of the Amendment to the Constitution would indicate that this is the only construction that could

possibly be given to this amendment of 1921. There it is found that concurrent power to enforce is given to Congress and the several States, not to the Territory. It is going beyond the ordinary rules of construction to say that Congress intended that there should be two sets of laws for the same act in the same Territory, with different penalties. As we understand the rules of construction, it is that where there is a conflicting penalty, the lesser should be enforced.

Can it be said that the people of the United States, when they voted for the Eighteenth Amendment to the Constitution, intended that Congress or the courts should hold that a citizen of Massachusetts should be fined \$500.00 for the offense herein charged, and that a citizen of Alaska should go to jail for a year and pay a fine in addition of \$1,000.00 which, if he did not pay, he would have to work out at the rate of \$2.00 per day? In other words, the man in Massachusetts would on the same ratio spend 250 days in jail, while the man in Alaska would have to spend 865 days. We think not.

Again, Section 10138, 4-5a, Comp. Stat., provides:

‘This Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction.  
\* \* \* \*’

Here is a declaration that is not found in the original Act. There is no exception. It is made to apply to “all territory subject to its jurisdiction.” Coupled with Section 10138 4/5c, *supra*, in which Congress declares that all laws shall continue in force “except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act and this Act,” it does not seem that there could be any question of what Act Congress intended should govern the trafficking in intoxicating liquors. In this amendment Congress has used the words “except such provisions of such laws as are directly in conflict with any of the provisions of the National Prohibition Act and this Act.” There is nothing in this language what would give to it or to the word “any” a construction different from the ordinary meaning.

We submit that it affirmatively appears from the language of the amendment that Congress intended that all violations of liquor laws under federal jurisdiction should be tried under the National Prohibition Act, and that the court was without

jurisdiction to try the plaintiff in error upon the complaint herein.

The record in this case shows that at the time of the trial there was an action pending against plaintiff in error under the National Prohibition Act for the same transaction. This standing alone would seem to indicate doubt on the part of the prosecuting officers as to whether the jurisdictional facts existed under the Alaska Dry Law.

IV. Assignments 9 and 10 relate to the trial court having overruled plaintiff-in-error's motion for an instructed verdict and in arrest of judgment. If our position upon the previous assignments herein discussed, or upon any of them, is correct, the error of the court below in refusing an instructed verdict of not guilty and in entering a judgment and sentence upon the verdict is manifest and need not be discussed.

For the errors committed we respectfully urge that plaintiff in error be granted a new trial.

Respectfully submitted,

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